153 U.S. 649

153-3-649

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1427~~. ~~890~~ 521 26-4

THOMAS LYONS AND ANGUS CAMPBELL, PARTNERS DOING BUSINESS AS LYONS AND CAMPBELL, ET AL., APPELLANTS,

vs.

JAMES B. WOODS, SHERIFF OF GRANT COUNTY, NEW MEXICO, AND EX OFFICIO COLLECTOR OF TAXES OF SAID COUNTY; RICHARD HUDSON, ASSESSOR, AND ANGUS CAMPBELL, JOHN CLASSEN, AND GRANVILLE N. WOOD, BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED OCTOBER 17, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1427.

THOMAS LYONS AND ANGUS CAMPBELL, PARTNERS DOING BUSINESS AS LYONS AND CAMPBELL, ET AL., APPELLANTS,

vs.

JAMES B. WOODS, SHERIFF OF GRANT COUNTY, NEW MEXICO, AND EX OFFICIO COLLECTOR OF TAXES OF SAID COUNTY; RICHARD HUDSON, ASSESSOR, AND ANGUS CAMPBELL, JOHN CLASSEN, AND GRANVILLE N. WOOD, BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court	2	1
Bill of complaint	3	1
Demurrer to bill	19	10
Substitution of solicitors	20	11
Final decree	21	11
Affidavit for appeal	22	12
Clerk's certificate	22	12
Stipulation to docket cause, &c.	23	13
Order setting cause for hearing	24	14
Order resetting cause for hearing	24	14
Orders for continuance	24	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1890.

	Original.	Print.
Order taking cause under advisement	25	14
Order for continuance	25	15
Final decree	26	15
Motion for appeal	27	15
Affidavit of value	28	16
Order allowing appeal	28	16
Citation (copy)	29	17
Bond for costs	30	17
Clerk's certificate	32	18
Opinion	33	19
Clerk's certificate to opinion	43	35
Citation (original)	44	36
Bond for costs	45	36

1 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

Be it remembered that heretofore, to wit, on the third day of January, 1887, Lyons and Campbell and others, by their solicitors, filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record in the cause theretofore pending in the district court of Grant county, in said Territory, in which the said Lyons and Campbell and others were complainants and James B. Wood, sheriff and *ex officio* collector of taxes of Grant county, and others were defendants; which said transcript of record is in the words and figures following, to wit:

2 In the Supreme Court of New Mexico. January Term, A. D. 1886.

LYONS, CAMPBELL, *et al.* }
vs.
JAMES B. WOODS *et al.* }

Appeal from Grant county.

Transcript.

William B. Childers, solicitor for appellants.

3 TERRITORY OF NEW MEXICO:

Third Judicial District Court, County of Grant.

Be it remembered that on the 27th day of August, A. D. 1885, there was filed in the office of the clerk of said court a bill, of which the following is a copy, to wit:

TERRITORY OF NEW MEXICO, }
County of Grant. }

In the District Court of the Third Judicial District of the Territory of New Mexico, Sitting within and for the County of Grant, at the December, 1885, Term Thereof.

To the Honorable William B. Fleming, associate justice of the supreme court of the Territory of New Mexico and judge of the third judicial district court thereof, in chancery sitting:

Your orators, Thomas Lyons and Angus Campbell, partners doing business under the firm name and style of Lyons & Campbell; Cornelius Bennett, Martin W. Bremen, and Joseph F. Bennett, all residents and citizens of the town of Silver City, in the county of Grant and Territory of New Mexico, and William J. Betterton, Charles L. Betterton, and Calvin Castlin, partners doing business at the town of Deming, in said county and Territory, under the firm name and style of Betterton, Son & Co., in behalf of themselves and all other

tax-payers of said Grant county who shall come in and contribute to the expenses of this suit, do bring this their bill of complaint against James B. Woods, sheriff and *ex officio* collector of taxes within and for said county, and Richard Hudson, assessor of said county of Grant, and Angus Campbell, John Classen, and Granville N. Wood, constituting the board of commissioners of the said county of Grant. Your orators represent that the defendant James B. Woods is sheriff and *ex officio* collector of taxes; that the defendant Richard Hudson is assessor, and defendants Angus Campbell and John Classen and Granville N. Wood are county commissioners and constitute the board of county commissioners of the county of Grant, in the Territory of New Mexico, and that all of said officers are residents and citizens of the said county of Grant; and thereupon your orators complain and say that each of your orators is a tax-payer within said county, and whose property is referred to and described in a certain list and assessment-roll now in the hands of said defendant, James B. Woods, prepared from assessments claimed to have been regularly made by the assessor of said Grant county, compiled under the direction of the board of county commissioners of said county, approved by said board July 10th, 1885, and received by said James B. Woods, sheriff and collector as aforesaid, on the 13th day of August, 1885, which said list, under the laws of the Territory of New Mexico, is the warrant and evidence of authority under and by virtue of which he, the said sheriff and *ex officio* collector, is about to collect and is collecting the various sums of money making up the several items of taxation as therein set forth; that among the items of taxation in said tax-list and assessment-roll (being for this present year, 1885) set forth and upon which each of your orators is therein noted as being taxed are the two items respectively described in said list as penitentiary bonds and capitol building bonds, and that the sums of money set opposite the names of each of your orators and in the columns headed respectively "penitentiary bonds" and "capitol building bonds" and levied as taxation upon your orators and upon each of them for purposes partially described by said column headings, and that the several assessments of property of your orators respectively and the amounts severally taxed thereon for said partially described purposes are as follows, to wit:

Lyons & Campbell, total assessable property, $158,310; penitentiary tax, $79.15; capitol building tax, $126.64.

Martin W. Bremen, total assessable property, $19,120; penitentiary tax, $9.41; capitol building tax, $15.06.

Cornelius Bennett, total assessable property, $6,900; penitentiary tax, $3.30; capitol building tax, $5.28.

Joseph F. Bennett, total assessable property, $7,490; penitentiary tax, $3.60; capitol building tax, $7.75.

Betterton, Son & Co., total assessable property, $11,285; penitentiary tax, $5.64; capitol building tax, $9.03.

Your orators further show that these items go to make up the sums total which the said sheriff and *ex officio* collector is about to collect from your orators respectively as the amount of taxation due

from each for various purposes pretended to be warranted by law and pretended to be due and payable for and during the year 1885; that the amounts of money thus in said list pretended to be due and payable upon account of penitentiary bonds and upon account of capitol building bonds and as taxation so levied for and on account of said items are so claimed and levied and included in said list by virtue and under authority of pretended acts of the Legis-
6 lative Assembly of said Territory pretended to have been approved by the Governor of said Territory, which said pretended acts so pretended to have been approved are entitled and described respectively as follows: "An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management," approved March 14, 1884, and "An act to provide for the erection of a capitol building in the city of Santa Fé," approved March 29, 1884. Your orators further represent that said pretended taxes under the pretended acts of the said Legislative Assembly aforesaid and by the terms thereof are to be assessed and levied in the same manner as other territorial taxes are levied and collected. Your orators further represent that the said pretended special taxes provided for under said pretended acts of the Legislative Assembly have been assessed by the tax assessor of the said county of grant, passed upon by the board of county commissioners of said county sitting as a board of equalization as required by law, and are now on the tax-lists in the hands of said defendant, Wood, as collector of county of Grant, which said tax-lists in the hands of said collector have attached to them the warrant provided by law requiring said collector to collect the taxes by said lists or rolls shown to have been levied, and that copies of said lists or rolls are now on file in the probate clerk's office of said county of Grant, and that all the steps required by law for the proper levy of taxes with reference thereto have been taken, so that the said lists and rolls in the hands of said defendant, the collector as aforesaid of said county of Grant, and the copies thereof in the said probate clerk's office on their face and by virtue of said pretended acts of the said Legislative Assembly aforesaid and the general revenue law of the Territory are a lien upon the real and personal property
7 of your orators in said county of grant, and are a cloud upon the title of your orators to their property, and that said taxation pretended to have been assessed under invalid and pretended laws of said Territory, as hereinafter alleged, have the force and effect of personal judgment against your orators and are liens upon *them* property as aforesaid, and said lists or rolls are by law given the effect of executions against the property of your orators so assessed.

Your orators further represent that said pretended acts of the Legislative Assembly entitled, as aforesaid, "An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management," approved March 14th, 1884, and "An act to provide for the erection of a capitol building in the city of Santa Fé," approved March 29, 1884, under which said assessment of taxation is made, and by virtue of which said pretended liens

against your orators' property are asserted, and by virtue of which said pretented assessment-rolls are claimed to have the effect of executions in the hands of the said defendant as sheriff and *ex officio* collector of said county of Grant, are not and never have become valid laws of said Territory of New Mexico, for the reason that the same never were introduced and passed through the council of said Legislative Assembly when a legal quorum of said council was present and participating in the proceedings thereof, and for the reason that a majority of a legal quorum of said council never voted in favor of said pretended laws so as to legally pass the same through said body; and your orators charge the facts to be that an act of Congress of the United States of America was passed and approved on the 14th day of February, 1884, and thereby became a law, which said act of Congress, among other things, provided that a
8 session of the Legislative Assembly of said Territory should be held, and said assembly convene on the third Monday of February, A. D. 1884; and said act of Congress declared that the members elected to the territorial Legislature of said Territory in November, 1882, and all vacancies legally filled since that time, if any, should be the legal members of the Legislature by said act authorized, subject to all valid contest.

Your orators further state that in accordance with said act of Congress a pretended session of said Legislative Assembly was held, commencing on the third Monday of February, A. D. 1884.

Your orators further state the fact to be, and that the same so appears by the published journal of the proceedings of said pretended session of the council of said Legislative Assembly, that upon the convening of said council on the said third Monday in February, A. D. 1884, only five members appeared who had regularly received certificates of election and were so shown to be elected by the election returns of the said election held in November, A. D. 1882, to have been elected members of said council, to wit, Josá Armijo y Vigil, of Socorro county; Pablo Gallegos, of Rio Arriba county; W. H. Keller and Andrew Sena, of San Miguel county, and John A. Miller, of Doña Ana, Lincoln, and Grant counties, and that thereupon the said five persons qualified as members of said council by taking the oath of office required by law and signing the roll of members.

Your orators further allege that by law the said council is composed of twelve members, and that seven thereof are necessary to constitute a legal quorum for the transaction of business.

Your orators further allege that after said five members
9 had been sworn in as aforesaid a motion was unanimously adopted by the vote of said five members only, and no more, that Thomas B. Catron, of Santa Fé county, be declared entitled *prima facie* to the seat from Santa Fé county, and that thereupon the said Thomas B. Catron took the oath of office as a member of said council, signed its roll, and thereafter acted as a member thereof.

And your orators further allege that said Catron's seat was claimed by Henry L. Warren, of Santa Fé county, and that said Warren held a certificate of election as a member of said council from Santa Fé

county; which said certificate was the first certificate of election issued by the county commissioners as evidence of the election of the member of said council from said county at said election held in said month of November, A. D. 1882, but that afterwards said county commissioners, acting under protest and compelled by an order of the district court in said county of Santa Fé, issued a certificate of election to said Thomas B. Catron.

Your orators further allege that they are not informed as to whom the election returns on file in the office of the secretary of the Territory show to have been elected as a member of said council from said county of Santa Fé at said election.

Your orators further allege that afterwards, while said council was composed of the said five persons as aforesaid and the said Thomas B. Catron and no others, a motion was therein introduced by the said John A. Miller to the effect that Charles C. McComas and José Manuel Montoya be declared entitled *prima facie* to the seats from Bernalillo county, subject to the right of contest, and that said motion was unanimously adopted by the vote of the said six members and no more, who were then acting, as aforesaid, as members of said council.

10 Your orators further allege that said Charles C. McComas and José M. Montoya held no certificates of election whatever as members of said body, but, on the contrary, Charles Montaldo and Francisco Perea held the certificates of election to the seats therein of the members from said county of Bernalillo, and that all the election returns of the election held in said month of November, A. D. 1882, both in the office of the county commissioners and in that of the secretary of said Territory, showed and still show that said Charles Montaldo and Francisco Perea received a majority of the votes cast in said county at said election for members of the council from said county, and that said Charles C. McComas and José M. Montoya did not receive a majority of said votes so cast and were not duly elected members of said council.

Your orators further allege that the said Charles C. McComas after the said election in November, A. D. 1882, had commenced proceedings as a contestant for the seat of said Charles Montaldo as a member in said council from Bernalillo county and served his notice of contest on said Montaldo and taken testimony under said notice of contest, and that said José M. Montoya had so commenced contest proceedings against the said Francisco Perea for the other seat of the member from said county of Bernalillo, and that said notice of contest so served and testimony so taken were duly filed with the secretary of the Territory and by him were transmitted and delivered to the said pretended council so organized as aforesaid, and at the time of the proceedings aforesaid the said papers relating to said contest were in possession of the said secretary, and that long afterwards, to wit, on the 3d day of April, A. D. 1884, the committee on elections of said pretended council reported to said body that

11 the said contested election cases had been referred to them, and that they found that said McComas and Montoya were entitled to the seats then held by them in said body, which said re-

ports are stated by the journal published by said body to have been on said day adopted.

Your orators further allege that the said six persons aforesaid and the said McComas and Montoya constituted said council until on or about the 25th day of March, A. D. 1884, when the said W. H. Kellar absented himself from said body and never afterwards participated in its proceedings.

And your orators further allege that after the said Kellar had ceased to act with said body J. Innocente Valdez, who was elected a member of the council from Colfax and Mora counties, took the oath of office and participated in the proceedings; but your orators allege that at no time during the pretended session of said body did more than six persons, including the said Thomas B. Catron, take part in its proceedings, except the said Charles C. McComas and J. M. Montoya, unlawfully and arbitrarily seated as aforesaid.

And your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when said bill aforesaid, entitled "An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating the management," was introduced and passed through its several readings in said body; that said last-mentioned bill by the journal of said pretended council is alleged to have passed, under a suspension of the rules of said council, on the 14th day of March, A. D. 1884, and which said journal shows that there were present on said day the said José Armijo y Vigil, T. B. Catron, Pablo Gallegos, W. H. Keller, and McComas, Miller, Montoya, and
12 Sena and no more, and that said journal does not show that said last-mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way except by the illegal and arbitrary action of the six persons aforesaid that said McComas and Montoya were entitled to said seats in said body.

And your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when said bill aforesaid, entitled "An act to provide for the erection of a capitol building in the city of Santa Fé," was introduced and passed through its several readings in said body; that said last-mentioned bill, by the journal of said body, is alleged to have passed, under a suspension of the rules, on the 26th day of March, A. D. 1884, and which said journal shows there were present on said day the said José Armijo y Vigil, T. B. Catron, and McComas, Montoya, Gallegos, Sena, Miller, and Valdez, and no more, and that of these Messrs. Catron, McComas, Montoya, Galligos, Sena, and Armijo y Vigil voted in favor of the passage of said last-mentioned bill, while Messrs. Miller and Valdez voted against the passage of the same; and that said journal does not show that said last-mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way, except by the illegal and arbitrary action of the six persons aforesaid, that said McComas and Montoya were lawfully entitled to seats in said body.

Your orators further represent that said pretended acts of the Legislative Assembly aforesaid, having been approved by the Governor's signature attached thereto and filed in the office of the secretary of the Territory and certified by said secretary as valid
13 laws, legally passed by the Legislative Assembly of the Territory, and that said acts have been incorporated and published in volumes of the laws of the Territory, so that on their face they seem to be valid laws, so as to give apparent validity to the assessment of said taxation and to the lien on the property of your orators aforesaid, when in truth and fact the said pretended acts of the said Legislative Assembly were never legally passed by said Legislative Assembly and are absolutely null and void, and that by reason of the premises the said defendant, collector as aforesoid, has acquired and can acquire no authority in law whatever for exacting and collecting the said pretended taxes from your orators, either by virtue of said pretended acts of the Legislative Assembly or the steps taken as aforesaid thereunder.

But your orators further allege that, nevertheless, the said assessments and said rolls constitute upon their face a lien as aforesaid upon the property of your orators in said county of Grant and are a cloud upon the title of your orators to their said property.

And your orators further represent that if the said sums of money so demanded by the said defendant by virtue of said illegal assessments as aforesaid are paid by your orators the same will be entirely lost to your orators, for the reason that said sums of money will pass into the hands of the treasurer of the Territory of New Mexico and be expended by virtue of said pretended acts of the Legislative Assembly in the erection of the building provided for by the said pretended acts or in payment of indebtedness incurred in erecting the same, and your orators will thereupon have no recourse upon the Territory of New Mexico for the recovery of the same.

Your orators further represent that, should they recover
14 judgments against the Territory therefor, the said judgments would not be available to your orators for the reason that the warrants issued by the Territory against funds in the hands of the treasurer are in excess of the amount of funds to meet the same, and are constantly so in excess, and your orators could not, therefore, recover the full amount so paid by them, and your orators could not recover the same for the reason that the warrants of the Territory of New Mexico will not bring on the market their face value; and your orators further allege that any judgments they might obtain for the sums demanded of them, if paid by them, would be paid to them in warrants of the Territory, depreciated as aforesaid.

Your orators further allege that by the terms and provisions of said pretended acts of the Legislative Assembly assessments thereunder will be made against the property of your orators and the payment of taxes thereunder be demanded each and every year during the official term of the defendant, and thereafter by his successors in office for a period of twenty years, for the purpose of providing for the payment of the bonds and interest thereon by said pretended acts au-

thorized to be issued unless the invalidity of said pretended acts of the Legislative Assembly should in some manner be determined by some competent court and the assessment and collection of said taxes be in some way restrained, and your orators be thereby subjected to a multiplicity of suits and harassing and annoying litigation to free their said property from said apparent liens and the clouds thereby created on their titles to their property aforesaid.

And your orators further allege that under the terms of the territorial revenue law, which by said pretended acts of the Legislative Assembly are made applicable to the assessment and collection of said tax so illegally exacted as aforesaid, the said defendant, as such collector, if empowered to sell your orators' real estate and issue to the purchaser thereof a certificate of sale, and thereafter, before the making and delivery of a deed to such purchaser or assignee, your orators, in order to redeem the same, would be compelled to pay the sums shown to have been paid by the person to whom such certificate was issued, together with all taxes subsequently paid by said purchaser, with interest thereon at the rate of three per cent. per month.

Your orators further allege that after the lapse of three years the collector then in office, upon request of the holder of such certificate, would be compelled to execute a deed for the property by such certificate shown to have been sold, and said deed, when so executed and delivered, would be *prima facie* evidence of all the facts necessary to convey to the grantee named therein a valid title to the property thereby conveyed.

Your orators allege that, should they permit their property to be sold under said illegal assessment, they would have to redeem the same within said period of three years or the deed so authorized would on its face convey their title to said property; all of which, your orators allege, will more fully appear from an inspection of said revenue law of the Territory and the aforesaid pretended acts of the Legislative Assembly under which said illegal assessment is alleged to have been made, and reference thereto is hereby expressly made and the same asked to be read as a part of this bill.

Your orators further represent that the said defendant, James B. Woods, as such sheriff and *ex officio* collector, is now demanding the payment of the said taxes so illegally assessed against your orators and their property and is threatening, unless your orators pay the said taxes, to sell your orators' property, and thereby cast a cloud upon your orators' title, and so threatening to sell the property of all other tax-payers in said county of Grant unless said tax-payers pay the said taxes assessed under said pretended acts of the Legislative Assembly against their property.

And your orators further allege that the said defendant, Richard Hudson, the assessor of said county of Grant, and the said defendant, The Board of County Commissioners of said County of Grant, will unlawfully assess and levy taxes against your orators and their property in said county of Grant for the ensuing year, A. D. 1886, under color of authority derived from said pretended acts of the Legislative Assembly, and they or their successors in office will

continue to so illegally assess and levy said pretended tax from year to year unless restrained from so doing by some competent court, and will thereby certainly subject your orators and other tax-payers of said county to the payment of the taxes so illegally levied or create clouds upon the titles of your orators and said tax-payers to their property in said county.

Your orators further allege that the damages suffered by them by reason of the premises is irreparable and will involve your orators in a multiplicity of suits.

Wherefore, and inasmuch as your orators are remediless in a court of law, they bring this their bill of complaint in your honor's court of chancery and pray that your honor will cause to issue, under the seal of this honorable court, a writ of injunction enjoining and restraining the said James B. Woods, sheriff and *ex officio* collector as aforesaid, and any of his deputies, his agents and employés, from in any manner further proceeding to collect and from taking any steps to further the collection of the said tax and the items of said taxation so in the aforementioned list described
17 as and placed under the headings of "penitentiary bonds" and "capitol building bonds" for the year 1885, and that the said defendant, Richard Hudson, assessor, and Angus Campbell and John Classen and Granville N. Wood, the board of county commissioners of said county of Grant, be restrained and enjoined by said writ of injunction from ever hereafter assessing any taxes against the property of your orators and other tax-payers in whose behalf this suit is brought for the purposes and under the authority of said pretended acts of the Legislative Assembly aforesaid, to wit, the act approved March 14, 1882, and entitled "An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management," and the act approved March 29, 1884, entitled "An act to provide for the erection of a capitol building in the city of Santa Fé;" that said injunction be made perpetual, and that such other and further relief be granted in the premises as to your honor may seem meet and just.

May it please your honor to grant unto your orators the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said James B. Woods, sheriff, etc., and to the said Richard Hudson, assessor of Grant county, and to the said Angus Campbell and John Classen and Granville N. Wood, commissioners as aforesaid of said Grant county, and their successors in office, commanding them and each of them, on a day to be therein named and under a penalty to be therein inserted, to be and appear before this honorable court and then and there full, true, and perfect answer make to the matters and things contained herein, answer of said defendants under oath being hereby expressly waived.

Your orators further pray that your honor will cause to be
18 issued forthwith, under the seal of this honorable court, a preliminary writ enjoining and restraining the said defendant, James B. Woods, sheriff and *ex officio* collector, and any of his deputies, his agents and employés, from further proceeding to collect and from taking any steps to further the collection of the said tax

and the items of said taxation so in the aforementioned list described as and placed under the headings of "penitentiary bonds" and "capitol building bonds" for the year 1885 until the further order of the court in the premises, and that the said defendants, Richard Hudson, assessor, and Angus Campbell and John Classen and Granville N. Wood, the board of county commissioners of said county of Grant, be forthwith restrained and enjoined by said writ of injunction last mentioned from hereafter assessing any taxes against the property of your orators and other tax-payers in whose behalf this suit is brought, for the purposes and under the authority of said pretended acts of the Legislative Assembly aforesaid, approved March 14, 1884, and entitled "An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management," and the act approved March 29, 1884, entitled "An act to provide for the erection of a capitol building in the city of Santa Fé," until the hearing of this cause or until the further orders of this court herein.

S. M. ASHENFELTER,
Solicitor for Complainants.

TERRITORY OF NEW MEXICO, }
County of Grant. }

Cornelius Bennett, being duly sworn, deposes and says that he is one of the complainants in the foregoing bill of complaint; that he has read the said bill of complaint and knows the contents
19 thereof, and that the same is true except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

CORNELIUS BENNETT.

[L. S.] Subscribed and sworn to before me, at Silver city, N. M., this 27th day of August, 1885.

S. M. ASHENFELTER,
Notary Public.

And be it further remembered that on the 30th day of November, A. D. 1885, a demurrer in said cause was duly filed in the office of said clerk, of which the following is a copy, to wit:

TERRITORY OF NEW MEXICO.

Third Judicial District Court, County of Grant. December Term, A. D. 1885.

THOMAS LYONS *et al.* }
vs. } Chancery.
JAMES B. WOODS *et al.* }

The joint and several demurrer of the defendants in the above-entitled cause to the bill of complaint herein.

These defendants say that they are advised that there is good

ground of demurrer to said bill, and they do demur accordingly, and for cause of demurrer say that the said bill of complaint contains no matter of equity whereon the court can ground any decree or give the complainants any relief as against these defendants; that the matters and things alleged in said bill of complaint whereon complainants base their prayer for relief are matters into which this court cannot inquire and upon which it has no jurisdiction to grant relief or render a decree against these defendants.

20 Whereupon these defendants do demur thereunto and pray judgment of the court whether they shall make answer to said bill otherwise than as aforesaid, and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

WM. BREEDEN,
Attorney General for the Territory of New Mexico,
Solicitor for Defendants.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WM. BREEDEN,
Solicitor for Defendants.

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

William Breeden, solicitor for defendants in the above-entitled cause, being duly sworn, upon his oath says that the foregoing demurrer is not interposed for delay.

WM. BREEDEN.

[L. S.] Subscribed and sworn to before me this 4th day of November, A. D. 1885.

WM. M. SLOAN,
Notary Public, San Miguel County, New Mexico.

And be it further remembered that on the 4th day of December, A. D. 1885, there was filed in said cause, in the office of said clerk, an instrument of which the following is a copy, to wit:

TERRITORY OF NEW MEXICO, }
County of Grant. }

District Court.

LYONS & CAMPBELL *et al.* }
vs. } Chancery.
JAMES B. WOODS *et al.* }

21 Now comes S. M. Ashenfelter, Esq., solicitor for complainants in said cause, and by leave of the court withdraws his name as solicitor for said complainants, and upon application of W. B. Childers, Esq., he is substituted as solicitor for said complainants in place of said Ashenfelter; and now comes the said S. M. Ashen-

felter and, by leave of the court and in compliance with his duty as district attorney, enters his appearance in said cause for the defendants herein.

And be it further remembered that on the 4th day December, 1885, a decree sustaining demurrer, dismissing the bill, and allowing the appeal was made and entered in the office of said clerk, of which the following is a copy, to wit:

TERRITORY OF NEW MEXICO, }
County of Grant. }

In the District Court, Third Judicial District, County of Grant.
In Chambers.

LYONS, CAMPBELL, *et al.* }
vs. } Chancery.
JAMES B. WOODS *et al.* }

Now come the parties in the above-entitled cause, by their respective solicitors—W. B. Childers, Esq., for the complainants, and S. M. Ashenfelter, district attorney for the third judicial district, for the defendants—and the demurrer heretofore filed to said bill coming on to be heard, and the court, having heard said bill, as well as the demurrer thereto, read and being now fully advised in the premises, doth adjudge, order, and decree that said demurrer be sustained, and the said complainants declining to plead further, the said bill is dismissed for want of equity; and it is further ordered, adjudged, and decreed that the defendants have judgment against the complainants for costs, and that execution issue therefor.

22 And thereupon complainants prayed an appeal to the supreme court of the Territory; which said appeal, upon filing the affidavit required by law, is granted.

W. F. HENDERSON,
Judge and Chancellor.

And be it further remembered that on the 4th day — December, A. D. 1885, an affidavit for appeal in said cause was filed in the office of said clerk, of which the following is a copy, to wit:

In the District Court of the Third Judicial District of the Territory of New Mexico for the County of Grant.

LYONS, CAMPBELL, *et al.* }
vs. } Chancery.
JAMES B. WOODS *et al.* }

William B. Childers, of lawful age, being duly sworn, on oath deposes and says that he is one of the solicitors for the complainants in the above-entitled cause and is their agent for the purpose of prosecuting said cause, and that the appeal from the decree of the court rendered in said cause is not taken for the purpose of vexa-

tion or delay, but because the affiant believes that the appellants are aggrieved by the judgment and decision of the court therein.

WILLIAM B. CHILDERS.

Sworn to and subscribed before me on this the 4th day of December, A. D. 1885.

[L. S.] W. J. JOBLIN, *Clerk.*

TERRITORY OF NEW MEXICO,
County of Grant, Third Judicial District, } *ss:*

23 I, W. J. Joblin, clerk of the third judicial district court of said Territory, do hereby certify that the foregoing is a full, true, and correct transcript of the pleadings and papers ordered by the appellants in the case of Lyons & Campbell *et al. vs.* James B. Woods *et al.*, as the same appears on file in my office.

Witness my hand and the seal of said court this 24th day of December, A. D. 1885.

[Seal of U. S. District Court, New Mexico, Third Judicial District.]

W. J. JOBLIN, *Clerk,*
By L. W. LENOIR, *Deputy.*

TERRITORY OF NEW MEXICO:

In the Supreme Court. January Term, A. D. 1886.

THOMAS LYONS *et al.*, Appellants,
vs.
JAMES B. WOODS *et al.*, Appellees. } Appeal from Grant County.

It is hereby stipulated and agreed by and between the complainants and appellants in said cause and the appellees that said cause may be docketed and the transcript therein filed and printed and the case heard at the present term of this court, the time of taking said appeal and the filing of the transcript therein being hereby waived.

W. B. CHILDERS,
Attorney for Appellants.
WM. BREEDEN,
Attorney General.

24 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government of said Territory, on the first Monday of January, in the year one thousand eight hundred and eighty-seven, the same being Monday, January 3rd, 1887, and on the second day of said term, the same being Tuesday, January 4th, 1887, the following, among other, proceedings were had, to wit:

LYONS and CAMPBELL *et al.*, Appellants,
vs.
JAMES B. WOODS, Sheriff, &c., *et al.*, Appellees. } 279. Appeal from Grant County.

It is ordered that the foregoing two causes be, and hereby are, set down for argument at the incoming of court on next Tuesday morning.

And afterwards, to wit, on the eighth day of the same term aforesaid, the same being Tuesday, January 11, 1887, the following, among other, proceedings were had, to wit:

LYONS and CAMPBELL *et al.*, Appellants,
vs.
JAMES B. WOODS, Sheriff, &c., *et al.* } 279. Appeal from Grant County.

These causes, being now called for hearing, are passed and reset for hearing on the twenty-second day of the present term.

And afterwards, to wit, on the twenty-ninth day of the same term aforesaid of said court, the same being Friday, February 4th, 1887, the following, among other, proceedings were had, to wit:

25 It is ordered that all motions, rules, causes, and other business not otherwise disposed of be, and they hereby are, continued until the June adjourned term of this court.

And afterwards, to wit, on the third day of said adjourned June term of said court, the same being June 15th, 1887, the following, among other, proceedings were had, to wit:

It is ordered that all causes, motions, rules, and other proceedings not otherwise disposed of be, and the same hereby are, continued until the next regular term of this court.

And afterwards, to wit, on the 22nd day of the regular January, 1888, term of said supreme court, the same being Thursday, January 26th, 1888, the following, among other, proceedings were had, to wit:

LYONS and CAMPBELL *et al.*, Appellants,
vs.
JAMES B. WOODS, Sheriff, &c., *et al.*, Appellees. } 279. Appeal from 3rd District, Grant County.

Come now the appellants, by W. B. Childers, Esq., their attorney, and the appellees also come, by Wm. Breeden, Esq., attorney general, and, by their agreement in open court made, this cause is submitted to the court for hearing upon the record and briefs of the respective parties on file, and the court takes the same under advisement.

And afterwards, to wit, on the 25th day of the same term last aforesaid, the same being Monday, January 30th, 1888, the following, among other, proceedings were had, to wit:

26 It is ordered that all actions, causes and proceedings, pleas and pleadings, as well as all motions and other matters now pending in this court and not otherwise disposed of, shall stand continued until the next regular term of this court.

And afterwards, to wit, on the 2nd day of April, eighteen hundred and eighty-nine, in vacation, a judgment in said cause was filed in the said clerk's office by the justices of said court, which was entered of record and is in the words and figures following, to wit:

LYONS and CAMPBELL *et al.*, Appellants,
vs.
JAMES B. WOODS, Sheriff, &c., *et al.*, Appellees.
} 279. Appeal from Grant County.

This cause having been submitted to the court at the January term, 1888, and taken under advisement, and the court, being now sufficiently advised in the premises, two of the judges thereof file their judgment in writing affirming the judgment of the lower court, for reasons stated in the opinion of Chief Justice Long now filed, Associate Justice Brinker dissenting in an opinion also now filed—

It is therefore ordered, adjudged, and decreed by the court that the decree in this cause of the district court in and for Grant county, whence this cause came into this court, be, and the same is hereby, affirmed, and that in accordance therewith said bill of complaint be, and the same hereby is, dismissed, and that said complainants pay the costs of this suit, as well in the lower court as in this court, to be taxed, and that execution issue therefor.

27 And it is further ordered that this judgment be entered *nunc pro tunc* as of the January, 1888, term, which is accordingly done.

ELISHA V. LONG,
Chief Justice, &c.

April 2nd, 1889, at Santa Fé, in vacation.

And afterwards, to wit, on the thirty-first day of January, 1890, said appellants, by their solicitor, filed in said clerk's office their motion for an appeal to the Supreme Court of the United States, which is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico. January Term, 1890.

LYONS and CAMPBELL *et al.*, Appellants,
vs.
JAMES B. WOODS, Sheriff, &c., *et al.*, Appellees.
} Appeal from Grant County.

Now come the said appellants, by their solicitor, and present to the court here an affidavit of value in the above-entitled cause

showing that the matter in controversy therein exceeds in value five thousand dollars exclusive of costs, and move the court to grant them an appeal from the decree of this court in this cause to the Supreme Court of the United States.

WILLIAM B. CHILDERS,
Sol. for Appellants.

And afterwards, to wit, on said January 31st, 1890, there was filed in said clerk's office an affidavit of value in said cause, which is in the words and figures following, to wit:

28 In the Supreme Court of the Territory of New Mexico. January Term, 1890.

TERRITORY OF NEW MEXICO, *County of Santa Fé,* } *ss:*

LYONS and CAMPBELL *et al.*, Appellants,
vs.
JAMES B. WOODS, Sheriff of Grant County, *et al.*, Appellees.
} Appeal from District Court, Grant County.

William B. Childers, being first duly sworn, deposes and says that the matter in controversy in the above-entitled cause exceeds in value the sum of five thousand dollars exclusive of costs.

W. B. CHILDERS.

Subscribed and sworn to before me this 31st day of January, 1890.
[SEAL.] S. BURKHART,
Clerk of Supreme Court of New Mexico.

And afterwards, to wit, on the twenty-third day of the regular January, 1890, term of the said supreme court, the same being January 31st, 1890, the following, among other, proceedings were had, to wit:

THOMAS LYONS and ANGUS CAMPBELL, Cornelius Bennett, Martin W. Bremen, and Joseph F. Bennett, William J. Betterton, Charles L. Betterton, and Calvin Castlin, Appellants,
vs.
JAMES B. WOODS, Sheriff and *ex Officio* Collector of Taxes of Grant County;
29 Richard Hudson, Assessor of the County of Grant, and Angus Campbell, John Classen, and Granville N. Wood, Board of County Commissioners of Grant County, Appellees.
} 279. Appeal from Grant County.

Now come said appellants, by their solicitor, W. B. Childers, Esq., and present to the court here an affidavit of value, by which it appears that the matter in controversy herein exceeds the sum of five

thousand dollars in value exclusive of costs, and move the court to grant them an appeal from the decree of this court in this cause to the Supreme Court of the United States; and the court, being sufficiently advised, grants said motion.

It is therefore ordered by the court that the said appellants be, and are hereby, granted an appeal from the decree of this court in this cause to the Supreme Court of the United States.

And afterwards, to wit, on said thirty-first day of January, 1890, there was filed in the said clerk's office a citation, acknowledgment of service thereof, in said cause, the original of which is attached hereto and is in the words and figures following, to wit:

The United States of America to James B. Woods, sheriff of Grant county, New Mexico, and *ex officio* collector of taxes of said county; Richard Hudson, assessor, and Angus Campbell, John Classen, and Granville N. Wood, board of county commissioners of Grant county, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1890, next, pursuant to an appeal taken from the decree of the supreme court of the Territory of New Mexico in the cause lately pending therein, in which Lyons and Campbell and others were appellants and you were appellees, by the said appellants to said Supreme Court of the United States, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico, this 31st day of January, 1890.

ELISHA V. LONG,
Chief Justice of the Supreme Court of the Territory of New Mexico.

I, Edward L. Bartlett, solicitor general of the Territory of New Mexico, attorney for said appellees, acknowledge the service of the within citation upon this 31st day of January, 1890.

EDWARD L. BARTLETT,
Solicitor General of New Mexico.

And afterwards, to wit, on said thirty-first day of January, 1890, said appellants filed in said clerk's office their bond for costs in the Supreme Court of the United States, the original of which is attached hereto, and is in the words and figures following, to wit:

Know all men by these presents that we, William B. Childers, of Albuquerque, in the county of Bernalillo and Territory of New Mexico, and N. B. Laughlin, of Santa Fé, in the county of Santa Fé and Territory of New Mexico, are held and firmly bound unto

James H. McKenney, clerk of the Supreme Court of the United
31 States, in the full and just sum of two hundred and fifty dollars, current money of the United States, to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirty-first day of January, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at Santa Fé, New Mexico, in a suit depending in the supreme court of the Territory of New Mexico between Lyons and Campbell *et al.*, appellants, and James B. Woods, sheriff of Grant county, *et al.*, appellees, and the said appellants having obtained an appeal to remove the said cause to the Supreme Court of the United States, decree having been rendered against said appellants by said supreme court of the Territory of New Mexico, and the said appellants having filed a transcript of record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said James H. McKenney, clerk as aforesaid, and charged to the said appellants in the prosecution of the said appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

WILLIAM B. CHILDERS. [SEAL.]
NAPOLEON B. LAUGHLIN. [SEAL.]

32 Sealed and delivered in presence of—
S. BURKHART.

I, —— ——, chief justice of the supreme court of the Territory of New Mexico, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

ELISHA V. LONG,
Chief Justice of the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO:

I, —— ——, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing thirty-one pages and ten lines contain a true, full, and perfect transcript of the record in the suit lately pending in the said court in which Lyons and Campbell and others were appellants and James B. Woods, sheriff, &c., *et al.* were appellees, including the citation and the bond for costs on appeal of said cause to the Supreme Court of the United States, as shown by the records and files of my office.

Seal Supreme Court, Territory of New Mexico.

Witness my hand and the seal of said supreme court this twenty-first day of February, 1890.

S. BURKHART,
Clerk of the Supreme Court of the Territory of New Mexico.

33 *Opinions of Court.*

(Supreme Court of New Mexico. April 2, 1889.)

LYONS *et al.*
v.
WOODS, Sheriff, *et al.*

Appeal from district court, Grant county.

Wm. B. Childers, for appellants; Wm. Breeden, att'y gen., for appellees.

LONG, *C. J.:*

On the authority of Chavez *v.* Luna (decided at the January term, 1889) the judgment of the court below in this cause is affirmed.

BRINKER, *J.* (dissenting):

On the 27th day of August, 1885, the complainants filed in the court below their bill of complaint against the defendants as follows:

"Your orators, Thomas Lyons and Angus Campbell, partners doing business under the firm name and style of Lyons & Campbell; Cornelius Bennett, Martin W. Bremen, and Joseph F. Bennett, all residents and citizens of the town of Silver City, in the county of Grant and Territory of New Mexico, and William J. Betterton, Charles L. Betterton, and Calvin Castlin, partners doing busi-
34 ness at the town of Deming, in said county and Territory, under the firm name and style of Betterton, Son & Co., in behalf of themselves and all other tax-payers of said Grant county who shall come in and contribute to the expenses of this suit, do bring this their bill of complaint against James B. Woods, sheriff and *ex officio* collector of taxes within and for said county, and Richard Hudson, assessor of said county of Grant, and Angus Campbell, John Classen, and Granville N. Wood, constituting the board of county commissioners of the said county of Grant. Your orators represent that the defendant James B. Woods is sheriff and *ex officio* collector of taxes; that the defendant Richard Hudson is assessor, and defendants Angus Campbell and John Classen and Granville N. Wood are county commissioners, and constitute the board of county commissioners of the county of Grant, in the Territory of New Mexico, and that all of said officers are residents and citizens of said county of Grant; and thereupon your orators complain and say that each of your orators is a tax-payer within said county and whose property is referred to and described in a certain list and assessment-roll now in the hands of said defendant, James B. Woods, prepared from assessments claimed to have been regu-

larly made by the assessor of said Grant county, compiled under the direction of the board of county commissioners of said county, approved by said board July 10, 1885, and rece ved by said James B. Woods, sheriff and collector as aforesaid, on the 13th day of August, 1885, which said list, under the laws of the Territory of New Mexico, is the warrant and evidence of authority under and by virtue of which he, the said sheriff and *ex officio* collector, is about to collect and is collecting the various sums of money making up the several items of taxation as therein set forth; that among the items of taxation in said tax-list and assessment-roll (being for this present year, 1885) set forth and upon which each of your orators is therein noted as being taxed are the two items respectively described in said list as 'penitentiary bonds' and 'capitol building bonds,' and that the sums of money set opposite the names of each of your orators and in the columns headed respectively 'penitentiary bonds' and 'capitol building bonds' and levied as taxation upon your orators and each of them for purposes partially described by said column headings, and that the several assessments of property of your orators respectively and the amounts severally taxed thereon for said partially described purposes are as follows, to wit: Lyons & Campbell, total assessable property, $158,310; penitentiary tax, $79.15; capitol building tax, $126.64. Martin W. Bremen, total assessable property, $19,120; penitentiary tax, $9.41; capitol building tax, $15.06. Cornelius Bennett, total assessable property, $6,900; penitentiary tax, $3.30; capitol building tax, $5.28. Joseph F. Bennett, total assessable property, $7,490; penitentiary tax, $3.60; capitol building tax, $7.75. Betterton, Son & Co., total assessable property, $11,285; penitentiary tax, $5.64; capitol building tax, $9.03.

"Your orators further show that these items go to make up the sums total which the said sheriff and *ex officio* collector is about to collect from your orators respectively as the amount of taxation due from each for various purposes pretended to be warranted by law and pretended to be due and payable for and during the year 1885; that the amounts of money thus in said list pretended to be due and payable upon account of penitentiary bonds and upon account of capitol building bonds and as taxation so levied for and on account of said items are so claimed and levied and included in said list by virtue and under authority of pretended acts of the Legislative Assembly of said Territory pretended to have been approved by the Governor of said Territory, which said pretended acts so pretended to have been approved are entitled and described respectively as follows: 'An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management,' approved March 14, 1884, and 'An act to provide for the erection of a capitol building in the city of Santa Fé,' approved March 29, 1884. Your orators further represent that said pretended taxes, under the pretended acts of the said Legislative Assembly aforesaid and by the terms thereof, are to be assessed and levied in the same manner as other territorial taxes are levied and collected. Your orators further represent that the said pretended special taxes

provided for under said pretended acts of the Legislative Assembly have been assessed by the tax assessor of the said county of Grant, passed upon by the board of county commissioners of said county sitting as a board of equalization as required by law, and are now on the tax-lists in the hands of the said defendant Woods as collector of the county of Grant, which said tax-lists in the hands of the said collector have attached to them the warrant provided by law requiring said collector to collect the taxes by said lists or rolls shown to have been levied, and that copies of said lists or rolls are now on file in the probate clerk's office of said county of Grant, and that all the steps required by law for the proper levy of taxes with reference thereto have been taken, so that the said lists and rolls in the hands of said defendant, the collector as aforesaid of said county of Grant, and the copies thereof in the said probate clerk's office, on their face and by virtue of said pretended acts of the said Legislative Assembly aforesaid and the general revenue law of the Territory, are a lien upon the real and personal property of your orators in the said county of Grant and are a cloud upon the title of your orators to their property, and that said taxation pretended to have been assessed under invalid and pretended laws of said Territory, as hereinafter alleged, has the force and effect of personal
35 judgments against your orators and are liens upon their property as aforesaid, and said lists or rolls are by law given the effect of executions against the property of your orators so assessed. Your orators further represent that said pretended acts of the Legislative Assembly entitled, as aforesaid, 'An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating the management,' approved March 14, 1884, and 'An act to provide for the erection of a capitol building in the city of Santa Fé,' approved March 29, 1884, under which said assessment of taxation is made, and by virtue of which said pretended liens against your orators' property are asserted, and by virtue of which said pretented assessment-rolls are claimed to have the effect of executions in the hands of the defendant as sheriff and *ex officio* collector of said county of Grant, are not and never have become valid laws of said Territory of New Mexico, for the reason that the same never were introduced and passed through the council of said Legislative Assembly when a legal quorum of said council was present and participating in the proceedings thereof, and for the reason that a majority of a legal quorum of said council never voted in favor of said pretended laws so as to legally pass the same through said body; and your orators charge the facts to be that an act of Congress of the United States of America was passed and approved on the 14th day of February, 1884, and thereby became a law, which said act of Congress, among other things, provided that a session of the Legislative Assembly of said Territory should be held, and said assembly convene on the third Monday of February, A. D. 1884; and said act of Congress declared that the members elected to the territorial Legislature of said Territory in November, 1882, and all vacancies legally filled since that time, if any, should be the legal members of the Legislature by said act

authorized, subject to all valid contest. Your orators further state that in accordance with the said act of Congress a pretended session of said Legislative Assembly was held, commencing on the third Monday of February, A. D. 1884.

"Your orators further state the fact to be, and that the same so appears by the published journal of the proceedings of said pretended session of the council of said Legislative Assembly, that upon the convening of said council on the said third Monday in February, A. D. 1884, only five members appeared who had regularly received certificates of election and were so shown to be elected by the election returns of said election held in November, A. D. 1882, to have been elected members of said council, to wit, José Armijo y Vigil, of Socorro county; Pablo Gallegos, of Rio Arriba county; W. H. Keller and Andres Sena, of San Miguel county, and John A. Miller, of Doña Ana, Lincoln, and Grant counties, and that thereupon the said five persons qualified as members of said council by taking the oath of office required by law and signing the roll of members. Your orators further allege that by law the said council is composed of twelve members, and that seven thereof are necessary to constitute a legal quorum for the transaction of business. Your orators further allege that after said five members had been sworn in as aforesaid a motion was unanimously adopted by the vote of said five members only, and no more, that Thomas B. Catron, of Santa Fé county, be declared entitled *prima facie* to the seat from Santa Fé county, and that thereupon the said Thomas B. Catron took the oath of office as a member of said council, signed its roll, and thereafter acted as a member thereof. And your orators further allege that said Catron's seat was claimed by Henry L. Warren, of Santa Fé county, and that said Warren held a certificate of election as a member of said council from Santa Fé county; which said certificate was the first certificate of election issued by the county commissioners as evidence of the election of the member of said council from said county at said election held in said month of November, A. D. 1882, but that afterwards said county commissioners, acting under protest and compelled by an order of the district court in said county of Santa Fé, issued a certificate of election to said Thomas B. Catron. Your orators further allege that they are not informed as to whom the election returns on file in the office of the secretary of the Territory show to have been elected as a member of said council from said county of Santa Fé at said election. Your orators further allege that afterwards, while said council was composed of the said five persons as aforesaid and the said Thomas B. Catron and no others, a motion was therein introduced by the said John A. Miller to the effect that Charles C. McComas and José Manuel Montoya be declared entitled *prima facie* to the seats from Bernalillo county, subject to the right of contest, and that said motion was unanimously adopted by the vote of the said six members and no more, who were then acting, as aforesaid, as members of said council.

"Your orators further allege that said Charles C. McComas and José M. Montoya held no certificates of election whatever

as members of said body, but, on the contrary, Charles Montaldo and Francisco Perea held the certificates of election to the seats therein of the members from said county of Bernalillo, and that all the election returns of the election held in said month of November, A. D. 1882, both in the office of the county commissioners and in that of the secretary of said Territory, showed and still show that said Charles Montaldo and Francisco Perea received a majority of the votes cast in said county at said election for members of the council from said county, and that said Charles C. McComas and José M. Montoya did not receive a majority of said votes so cast and were not duly elected members of said council. Your orators
36 further allege that the said Charles C. McComas after the said election in November, A. D. 1882, had commenced proceedings as a contestant for the seat of said Charles Montaldo as a member in said council from Bernalillo county and served his notice of contest on said Montaldo and taken testimony under said notice of contest, and that said José M. Montoya had so commenced contest proceedings against the said Francisco Perea for the other seat of the member from said county of Bernalillo, and that said notice of contest so served and testimony so taken were duly filed with the secretary of the Territory and by him were transmitted and delivered to the said pretended council so organized as aforesaid, and at the time of the proceedings aforesaid the said papers relating to said contest were in the possession of the said secretary, and that long afterwards, to wit, on the 3d day of April, A. D. 1884, the committee on elections of said pretended council reported to said body that the said contested election cases had been referred to them, and that they found that said McComas and Montoya were entitled to the seats then held by them in said body, which said reports are stated by the journal published by said body to have been on said day adopted. Your orators further allege that the said six persons aforesaid and the said McComas and Montoya constituted said council until on or about the 25th day of March, A. D. 1884, when the said W. H. Kellar absented himself from said body and never afterwards participated in its proceedings; and your orators further allege that after the said Kellar had ceased to act with said body J. Inocente Valdez, who was elected a member of the council from Colfax and Mora counties, took the oath of office and participated in the proceedings; but your orators allege that at no time during the pretended session of said body did more than six persons, including the said Thomas B. Catron, take part in its proceedings, except the said Charles C. McComas and J. M. Montoya, unlawfully and arbitrarily seated as aforesaid; and your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when said bill aforesaid, entitled 'An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management,' was introduced and passed through its several readings in said body; that said last-mentioned bill by the journal of said pretended council is alleged to have passed, under a suspension of the rules of said council, on the 14th day of March, A. D. 1884, and which said journal shows that there were present

on said day the said José Armijo y Vigil, T. B. Catron, Pablo Gallegos, W. H. Keller, and McComas, Miller, Montoya, and Sena and no more, and that said journal does not show that said last-mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way except by the illegal and arbitrary action of the six persons aforesaid that said McComas and Montoya were entitled to said seats in said body; and your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when said bill aforesaid, entitled 'An act to provide for the erection of a capitol building in the city of Santa Fé,' was introduced and passed through its several readings in said body; that said last-mentioned bill, by the journal of said body, is alleged to have passed, under a suspension of the rules, on the 26th day of March, A. D. 1884, and which said journal shows there were present on said day the said José Armijo y Vigil, T. B. Catron, and McComas, Montoya, Gallegos, Sena, and Miller, and Valdez, and that of these Messrs. Catron, McComas, Montoya, Gallegos, Sena, and Armijo y Vigil voted in favor of the passage of said last-mentioned bill, while Messrs. Miller and Valdez voted against the passage of the same; and that said journal does not show that said last-mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way, except by the illegal and arbitrary action of the six persons aforesaid, that said McComas and Montoya were lawfully entitled to seats in said body.

"Your orators further represent that said pretended acts of the Legislative Assembly aforesaid, having been approved by the Governor's signature attached thereto and filed in the office of the secretary of the Territory and certified by said secretary as valid laws, legally passed by the Legislative Assembly of the Territory, and that said acts have been incorporated and published in volumes of the laws of the Territory, so that on their face they seem to be valid laws, so as to give apparent validity to the assessment of said taxation and to the lien on the property of your orators aforesaid, when in truth and fact the said pretended acts of the said Legislative Assembly were never legally passed by said Legislative Assembly and are absolutely null and void, and that by reason of the premises the said defendant, collector as aforesaid, has acquired and can acquire no authority in law whatever for exacting and collecting the said pretended taxes from your orators, either by virtue of said pretended acts of the Legislative Assembly or on the steps taken as aforesaid thereunder; but your orators further allege that, nevertheless, the said assessments and said rolls constitute upon their face a lien as aforesaid upon the property of your orators in said county of Grant and are a cloud upon the title of your orators to their said property; and your orators further represent that if the said sums of money so demanded by the said defendant by virtue of said illegal assessments as aforesaid are paid by your orators the same will be entirely lost to your orators, for the reason that said sums of

money will pass into the hands of the treasurer of the Terri-
37 tory of New Mexico and be expended by virtue of the said pretended acts of the Legislative Assembly in the erection of the building provided for by the said pretended acts or in payment of indebtedness incurred in erecting the same, and your orators will thereupon have no recourse upon the Territory of New Mexico for the recovery of the same. Your orators further represent that, should they recover judgments against the Territory therefor, the said judgments would not be available to your orators for the reason that the warrants issued by the Territory against funds in the hands of the treasurer are in excess of the amount of funds to meet the same, and are constantly so in excess, and your orators could not, therefore, recover the full amount so paid by them, and your orators could not recover the same for the reason that the warrants of the Territory of New Mexico will not bring on the market their face value; and your orators further allege that any judgments they might obtain for the sums demanded of them, if paid by them, would be paid to them in warrants of the Territory, depreciated as aforesaid.

"Your orators further allege that by the terms and provisions of said pretended acts of the Legislative Assembly assessments thereunder will be made against the property of your orators and the payment of taxes thereunder be demanded each and every year during the official term of the defendant, and thereafter by his successors in office for a period of twenty years, for the purpose of providing for the payment of the bonds and interest thereon by said pretended acts authorized to be issued unless the invalidity of said pretended acts of the Legislative Assembly should in some manner be determined by some competent court and the assessment and collection of said taxes be in some way restrained, and your orators be thereby subjected to a multiplicity of suits and harassing and annoying litigation to free their said property from said apparent liens and the clouds thereby created on their titles to their property aforesaid.

"And your orators further allege that under the terms of the territorial revenue law, which by said pretended acts of the Legislative Assembly are made applicable to the assessment and collection of said tax so illegally exacted as aforesaid, the said defendant, as such collector, is empowered to sell your orators' real estate and issue to the purchaser thereof a certificate of sale, and thereafter, before the making and delivery of a deed to such purchaser or assignee, your orators, in order to redeem the same, would be compelled to pay the sums shown to have been paid by the person to whom such certificate was issued, together with all taxes subsequently paid by said purchaser, with interest thereon at the rate of three per cent. per month. Your orators further allege that after the lapse of three years the collector then in office, upon request of the holder of such certificate, would be compelled to execute a deed for the property by such certificate shown to have been sold, and said deed, when so executed and delivered, would be *prima facie* evidence of all the facts necessary to convey to the grantee named therein a valid title to the property thereby conveyed. Your

orators further allege that, should they permit their property to be sold under said illegal assessment, they would have to redeem the same within said period of three years or the deed so authorized would on its face convey the title to said property; all of which, your orators allege, will more fully appear from an inspection of said revenue law of the Territory and the aforesaid pretended acts of the Legislative Assembly under which said illegal assessment is alleged to have been made, and reference thereto is hereby expressly made and the same asked to be read as a part of this bill.

"Your orators further represent that the said defendant, James B. Woods, as such sheriff and *ex officio* collector, is now demanding the payment of the said taxes so illegally assessed against your orators and their property and is threatening, unless your orators pay the said taxes, to sell your orators' property, and thereby cast a cloud upon your orators' title, and so threatening to sell the property of all other tax-payers in said county of Grant unless said tax-payers pay the said taxes assessed under said pretended acts of the Legislative Assembly against their property; and your orators further allege that the said defendant, Richard Hudson, the assessor of said county of Grant, and the said defendant, The Board of County Commissioners of said County of Grant, will unlawfully assess and levy taxes against your orators and their property in said county of Grant for the ensuing year, A. D. 1886, under color of authority derived from said pretended acts of the Legislative Assembly, and they or their successors in office will continue to so illegally assess and levy said pretended tax from year to year unless restrained from so doing by some competent court, and will thereby certainly subject your orators and other tax-payers of said county to the payment of the taxes so illegally levied or create clouds upon the titles of your orators and said tax-payers to their property in said county. Your orators further allege that the damages suffered by them by reason of the premises is irreparable and will involve your orators in a multiplicity of suits.

"Wherefore, and inasmuch as your orators are remediless in a court of law, they bring this their bill of complaint in your honor's court of chancery and pray that your honor will cause to issue, under the seal of this honorable court, a writ of injunction restraining and enjoining the said James B. Woods, sheriff and *ex officio* collector as aforesaid, and any of his deputies, his agents and employés, from in any manner further proceeding to collect and from taking any steps to further the collection of the said tax and
38 the items of said taxation so in the aforementioned list described as and placed under the headings of 'penitentiary bonds' and 'capitol building bonds' for the year 1885, and that the said defendant, Richard Hudson, assessor, and Angus Campbell and John Classen and Granville N. Wood, the board of county commissioners of said county of Grant, be restrained and enjoined by said writ of injunction from ever hereafter assessing any taxes against the property of your orators and other tax-payers in whose behalf this suit is brought for the purposes and under the authority of said pretended acts of the Legislative Assembly aforesaid, to wit,

the act approved March 14, 1884, and entitled 'An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management,' and the act approved March 29, 1884, entitled 'An act to provide for the erection of a capitol building in the city of Santa Fé;' that said injunction be made perpetual, and that such other and further relief be granted in the premises as to your honor may seem meet and just. May it please your honor to grant unto your orators the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said James B. Woods, sheriff, etc., and to the said Richard Hudson, assessor of Grant county, and to the said Angus Campbell and John Classen and Granville N. Wood, commissioners as aforesaid of said Grant county, and their successors in office, commanding them and each of them, on a day to be therein named and under a penalty to be therein inserted, to be and appear before this honorable court and then and there full, true, and perfect answer make to the matters and things contained herein, answer of said defendants under oath being hereby expressly waived. Your orators further pray that your honor will cause to be issued forthwith, under the seal of this honorable court, a preliminary writ enjoining and restraining the said defendant, James B. Woods, sheriff and *ex officio* collector, and any of his deputies, his agents and employés, from further proceeding to collect and from taking any steps to further the collection of the said tax and the items of said taxation so in the aforementioned list described as and placed under the headings of 'penitentiary bonds' and 'capitol building bonds' for the year 1885 until the further order of the court in the premises, and that the said defendants, Richard Hudson, assessor, and Angus Campbell and John Classen and Granville N. Wood, commissioners of said county of Grant, be forthwith restrained and enjoined by said writ of injunction last mentioned from hereafter assessing any taxes against the property of your orators and other tax-payers in whose behalf this suit is brought, for the purposes and under the authority of said pretended acts of the Legislative Assembly aforesaid, approved March 14, 1884, and entitled 'An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management,' and the act approved March 29, 1884, entitled 'An act to provide for the erection of a capitol building in the city of Santa Fé,' until the hearing of this cause or until the further orders of this court herein."

Afterwards, on the 30th day of November, 1885, the defendants appeared and filed the following demurrer: "These defendants say that they are advised that there is good ground of demurrer to said bill, and they do demur accordingly, and for cause of demurrer say that the said bill of complaint contains no matter of equity whereon the court can ground any decree or give complainants any relief as against these defendants; that the matters and things alleged in said bill of complaint whereon complainants base their prayer for relief are matters into which this court cannot inquire and upon which it has no jurisdiction to grant relief or render a decree against these defendants. Whereupon these defendants do demur thereunto

and pray judgment of the court whether they shall make answer to said bill otherwise than as aforesaid, and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained."

The demurrer was sustained *pro forma* and a final decree passed dismissing the bill. From this decree complainants appealed.

The only question in this case presented for determination is the validity of the acts of the Legislature mentioned in the bill. This question has been decided at this term in the case of Chavez *v.* Luna, *ante*, 344, by a majority of the court adversely to the complainants, and, unless the views of the court as expressed in the opinion delivered by Mr. Justice Henderson have undergone a change, the judgment in that case will be decisive of this and the ruling and judgment of the court below be affirmed.

I assume in the outset that the court is of the same mind now as when that determination was reached, and shall discuss this case upon that assumption. If I could agree with my associates in their decision there would be no necessity for saying more than than that this case should follow and be determined by the judgment in that; but, with the greatest respect for their opinion, I am impelled by what appear to me to be the soundest principles of law to a different conclusion. It may be said that I should have recorded my dissent in that case. A sufficient answer to the suggestion is that I did not sit in that case in this court, and, of course, was not in a position to take part in the deliberations or judgment of the court.

It is admitted that the laws assailed were passed by a so-called "Legislative Assembly," one branch of which was organized by a a less number than a majority of all the legal members elected and authorized by the act of Congress providing for the holding of that session, and that this minority upon a mere motion admitted as members three other persons who held
39 no certificates of election from the proper authority, and in fact no certificates whatever, at the time of their admission, but were present in the attitude of contestants for the seats of three persons who held certificates showing, *prima facie*, their right to be seated and recognized as members of the council; that the contests so instituted were referred to a committee, but before such committee had reported on them the acts complained of were introduced and passed, and that the three persons so illegally seated by the minority voted upon the question of their passage; that subsequent thereto the committee reported on the contests favorably to the persons holding the contested seats. The persons holding certificates, and who organized the council and assumed to admit the three persons not holding certificates, were five in number. By section 5 of the act of Congress of September 9, 1850 (9 St. at Large, p. 448, § 5), it is provided that the council of this Territory shall consist of 13 members. The act of June 19, 1878 (20 St. at Large, 193), limits the number to 12, and directs the Legislative Assembly, at its next session, to divide the Territory into representative and council districts. The act of June 27, 1879 (21 St. at Large, 35), provides that the provisions of the act of June 19, 1878, *supra*,

shall not be so construed as to impair or shorten the terms of office of any member of the Legislative Assembly until the Territory shall have been redistricted as in that act provided, "nor until, at the next regular election thereafter, the twelve members of the council * * * shall have been elected and their term of office begun." 1 Supp. Rev. St. U. S., 495.

On December 21, 1881, Congress passed an act declaring the election held for members of the Legislature on the 2d day of November, 1880, to be valid, although the election was not in accordance with the act of June 19, 1878, and validating all the acts of the Legislature the members of which were chosen at that election, and requiring such Legislature to proceed at once upon its assembling to apportion the representative and council districts provided for in the act of June 19, 1878, according to the census of 1880. This act further provided that if such Legislature should fail to make such apportionment, then it should be made in accordance with the provisions of the act providing for the re-apportionment of the members of the Legislature of Montana, Idaho, and Wyoming, approved June 3, 1880, which latter act is by this act made applicable to New Mexico. It then requires the members of the board of apportionment to assemble at the capital and complete their work on or before the first Monday of September then next ensuing. 22 St. at Large, 1. The act of June 3, 1880, referred to and adopted as a part of the act last cited, provides that the Governor, the speaker of the house of representatives, and the president of the council, during the last session of the Legislatures in Montana, Idaho, and Wyoming, are authorized and empowered to act as a board of apportionment of their respective Territories, and requires them, or a majority of them, when assembled at the capital, to re-apportion the members of the council and house of representatives in their respective Territories upon the basis of population shown by the census of 1880; that they shall forthwith certify such re-apportionment and file it in the office of the secretary of their respective Territories, and within 10 days thereafter the Governor shall issue a proclamation for an election of members of the Legislature according to such apportionment. 21 St. at Large, 154. The act of February 14, 1884, provides that the members elected to the Legislature in the year 1882 and persons selected legally to fill vacancies shall be the legal members of the Legislature for the year 1884, subject to all valid contests, and directs the Legislature to convene on the third Monday of February, 1884. 23 St. at Large, 3.

I am not advised whether the directions of Congress as to redistricting the Territory have ever been complied with by the Legislature or by the officers specially empowered to perform that duty. In the session of 1880 there were 13 members of the council (Acts N. M., 1880, p. 11), and the same number in the session of 1882 (Acts N. M., 1882, p. 7). The bill alleges that by law the council was composed of 12 members, and that 7 constituted a quorum. This is admitted by the demurrer to be true. From this it may be fairly presumed that either the Legislature or the Governor, speaker of the house, and the president of the council made the apportionment re-

quired by the acts of Congress at some time before the session of 1884 was to convene. The evidence of such action has not been called to my attention, however, beyond the allegations of the bill. Whether the council consisted of 13 members under the act of September 9, 1850, or of 12, as provided in the later acts, *supra*, 7 would be a majority of all the members elected. None of the acts of Congress relating to the organization of the Territories prescribe what number of either house of the Legislature shall constitute a quorum for the purpose of organization or for the transaction of business, nor does the act of any previous Legislature do so. In this state of the case resort must be had to well-settled principles applicable to all legislative and deliberative bodies.

It will not be pretended that any valid legislation could be enacted unless there was in existence and acting a Legislature legal in both branches. The following proposition seems to be well established, namely, that a council could not admit persons to seats in its body as members unless there was then in existence and acting a legal council fully equipped and competent to legally discharge all of the duties contemplated by the law of its creation. In other words, the council must have an actual, potential, legal existence before it could do any act as a council, such as passing upon the right of claimants to seats in its body, or discharging any other function, except, perhaps, to adjourn from time to time and enforce the attendance of absent members. Such a body can only exist when there are present all or a legal quorum of persons *prima facie* entitled to seats. This does not conflict with the rule that each house is the judge of the election returns and qualifications of its own members. That rule is subordinate to the primary rule that there must first be a legally constituted house, composed of persons *prima facie* entitled to seats, amounting in numbers to all or a legal quorum of the members elected. Until such a house exists the principle does not apply, for there is no body competent to judge.

By section 1921, Rev. St. U. S., 1878, the secretary of the Territory is charged with the duty of administering the oath to all members-elect of both houses of the Legislative Assembly. This section impliedly gives the secretary the power, in the first instance, to determine who are entitled to seats in either house for the purpose of organization, and to the extent, at least, of securing a quorum. So, under its provisions, there could be no valid excuse for any number of members of the council less than a majority attempting to proceed with the organization, unless the secretary should be absent.

The Constitution of the United States (article 1, § 5) provides that a majority of each house of Congress shall constitute a quorum. This is but the declaration of a general principle of parliamentary law, recognized and enforced in all deliberative assemblies, in the absence of some other specific rule on the subject, as is shown by the following authorities: In Hatsell's House of Commons Precedents, a work covering the period from the year A. D. 1290 to the year 1818, and cited by Mr. Jefferson frequently in his Manual, it is said (volume 2, p. 125): "In general, the chair is not to be taken till a

quorum for business is present, unless, after due waiting, such a quorum be despaired of, when the chair may be taken and the house adjourned; and, whenever during business it is observed that a quorum is not present, any member may call for the house to be counted, and, being found deficient, business is suspended." Jeff. Man., § 6. Roberts says: "A quorum of an assembly is such a number as is competent to transact its business. Unless there is a special rule on the subject, the quorum of every assembly is a majority of all the members of the assembly." Rules of Order, 113. Fland. Const., 82, 83: "In all councils and other collective bodies of the same kind it is necessary that a certain number, called a 'quorum of the members,' should be present in order to the transaction of business. This regulation has been essential to secure fairness of proceeding. . The number necessary to constitute a quorum of any assembly may be fixed by law, as is the case with most of our legislative assemblies; or by usage, as in the English House of Commons; or it may be by the assembly itself; but if no rule is established on the subject in any of these ways, a majority of the members composing the assembly is the requisite number. No business can regularly be entered upon until a quorum is present, nor can any business be regularly proceeded with when it appears that the members present are reduced below that number." Cush. Man., §§ 17–19. Mr. Wapples states the rule thus: "A quorum is a majority of the members. It is never less, under the common law of parliamentary procedure. Unless more than half of the members of the body are present, the body is not present. When more than half are present the body is complete, and is as though all the members were present. If less than half could do business it would be possible for deliberative bodies to be divided into two or more assemblies, each capable of doing business, and each liable to adopt measures contrary to those adopted by some other section." Parl. Prac., 158. "Legislative bodies in this country do not modify the common-law requirement." *Id.*, 228. See also 1 Story, Const., §§ 831–834; Cline *v.* Trustees, 20 Ohio St., 288; Southworth *v.* Railroad Co., 2 Mich., 287, and cases cited in note. In the last case, *supra*, the word "house" is held to mean a majority of all its members. Appellants cite The Executive Session, 12 Fla., 659, to the point now being discussed. The report is not accessible and the case has not been examined. Appellees have filed no brief. After a very careful examination of the books at hand I have been unable to find anything in conflict with the foregoing authorities. The principles stated in them are so well settled and familiar that I fear I may be open to the criticism of having laboriously argued upon "hornbook law." If so, my apology is that the occasion seemed to demand it.

These authorities settle the point that there must be a legal quorum before there can be a legal body, and that, in the absence of a special rule on the subject, a quorum must consist of at least a majority of all the legally elected members. If the council must consist of 12 or 13 members, and if a majority of its members is necessary to constitute a quorum, and if but 5 members were sworn in by the secretary of the Territory, and if these 5, and no more, took

it upon themselves to effect an organization of the council and admit other persons not entitled *prima facie* to membership, then no legal council ever convened. To hold otherwise would be to countenance the most flagrant usurpation and encourage a course of proceeding that would inevitably result in revolution. If five members of the council could determine who were entitled to seats, then three members might do so, or any other number less than a legal quo-
41 rum. The history of the Legislature of 1884 presents just such a state of affairs as Mr. Wapples predicts would result if less than a quorum were permitted to act for and in the name of the body. There were two so-called "councils" during that session. The one whose acts are now under review, although illegal, as I think I have shown, secured the recognition of the house of representatives and of the executive. The other, although considered illegal by the executive and the house of representatives, held its meetings in the council chamber, while the recognized council held its meetings elsewhere, both bodies claiming to be the council and causing endless confusion and uneasiness in the minds of the citizens of the Territory.

In disposing of this part of the case the court in Chavez *v.* Luna cite with evident approval the case of People *v.* Mahaney, 13 Mich., 481, and quote extensively from the opinion of Judge Cooley in that case. With due deference, I must be permitted to say that in my opinion the reasoning of the learned judge and the principles there announced have no application to this case. In order to properly estimate the value of a decision as a precedent it may be stated as a rule that the facts upon which such decision is based should be attended to and carefully examined, and if there be a substantial difference between those facts and the facts of the case to which the decision is sought to be applied as a precedent, then such decision ought not to be considered an authority. It has been ruled: "The language of a court must always be construed with reference to and in connection with the facts before it." Bell *v.* Railroad Co., 4 Smedes & M., 549. Again: "The language of a decision is seldom, if ever, to be taken in a general sense, however general in the form of the expression, not mentioning exceptions and limitations. It should rather be understood as spoken in reference to the facts under consideration and limited in meaning by those facts." Ram, Judgm., 251, and citations. In Brooks *v.* Marbury, 11 Wheat., 91, Marshall, C. J., says: "An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different." See also Quin *v.* Lloyd, 41 N. Y., 353. With this rule in mind, the case of People *v.* Mahaney, when examined, will be easily distinguished from this and shown not to be in point. In that case there was no question made as to the organization of the house of representatives, or that a legal quorum existed. The act assailed was one which, in order to have effect immediately upon its passage, the constitution required should receive the assent of two-thirds of the members elected to each house. The plea set up a state of facts "which it is claimed shows that in the house of representatives the two-thirds vote of sixty-seven members

included several who had not been elected by a majority of legal votes, but who, it is also claimed by the pleas, were notwithstanding retained in their seats by an adjudication of the house in their favor." 13 Mich., 491. Upon this state of facts the remarks quoted in Chavez *v.* Luna, from Judge Cooley's opinion, are based. What was necessary to make a legal house or what was the requisite number of members to constitute a lawful quorum is not even suggested by the plea nor hinted at in the opinion of the court. How many members of the house charged not to have been elected are embraced in the word "several" cannot even be conjectured. If there was "an adjudication by the house" seating the persons who are charged in the plea not to have been elected, then there must have been a legal quorum of the house present participating in such adjudication, composed of at least a majority of the members required by the constitution to make a full house (Southworth *v.* Railroad Co., *supra*); and, if so, then such quorum was competent to make the adjudication, its action in that behalf was conclusive, and the courts could not inquire into the facts upon which it based its judgment.

There is nothing, I insist, in the case cited in conflict with the principle quoted above, that until there is a legal quorum of the house present the house is not present, and, not being present, it could not adjudicate. The reluctance of the courts to investigate the acts of a legislative body and the evils that would flow from a too close scrutiny of the details of their proceedings, as stated by Judge Cooley, ought to have little weight where there is an entire non-existence of the body itself. Great evils would result were the acts of less than a legal quorum held to be beyond judicial inquiry. When once it is established that two or three or five or any number of persons, legally elected though they may be, but falling short of a majority or other legal quorum, can meet and at their own sweet will say who shall and who shall not be admitted to take part in the passage of laws affecting alike the lives, liberties, and property of the citizens, without reference to whether the persons so admitted shall have at least a *prima facie* right to membership, then will the boasted security of constitutional government become a mockery.

This court quotes the seventh section of the organic act, to the effect that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States, and that all laws passed by the Legislature shall be submitted to Congress, and, if disapproved, shall be of no effect (sections 1850, 1851, Rev. St. U. S.), and concludes: "Whether in these general terms it was intended by Congress to confer legislative powers upon the Legislative Assembly of New Mexico, with the usual and ordinary incidental judicial power to determine finally the election, qualification, and return of the members, we do not decide. It is sufficient to say that by the very terms of the organic act above quoted 'all of the laws passed by the Legislative As-
42 sembly and Governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect.' We must presume that, in obedience to the fundamental law of the Territory, these acts, together with all others passed at

the session of 1884, were submitted to Congress; and, there being nothing to show that they were disapproved, they have received the passive assent of Congress, and have been in that way approved. Congress had plenary power over the subject, and, being approved by it, there is nothing upon which to ground the jurisdiction of the courts over the subject sought to be reviewed." Upon this conclusion the judgment rests. That this conclusion is not a necessary one I think is capable of demonstration. While it is true, as intimated, but not decided, that Congress has vested the territorial Legislature and each house of it by necessary implication with the ordinary incidental judicial power to determine finally the election, qualifications, and returns of its members, and while it is also true that Congress has plenary power to annul all acts passed by the Assembly, and has reserved that power expressly in the organic act, I contend that the mere fact that Congress has failed to exercise such power should not be construed as an implied assent to the acts of the Legislature submitted to it.

An examination of the legislation of Congress from September 9, 1850 (the date of our organic act), down to the present time will show that but three laws passed by the Legislature of this Territory have ever been disapproved (16 St. at Large, 44, 278; 20 St. at Large, 280); and the disapproval was not because of any illegality in the organization of the Legislature nor in the regularity of the proceedings attending their passage, but solely because the policy of the laws was not such as to commend them to Congress or because they contravened the organic act. So far as anything to the contrary appears, the Legislature in each instance was legally organized and every step necessary to the legal passage of the laws in regular form was taken, from the introduction of the bills to their final passage. The only instances in which Congress has been called upon to pass judgment upon matters occurring here because of irregularity, so far as I have been able to examine the question, were on March 26, 1867, when it passed an act violating the laws passed by the Legislature in 1866, and which had been signed by the acting secretary instead of by the Governor, as required by section 1842 of the organic act (15 St. at Large, 23), and on December 21, 1881, when it passed an act approving and making legal the election of members of the Legislature in the year 1880 (22 St. at Large, 1). This action by Congress tends strongly to prove that Congress did not consider a mere failure to disapprove an invalid law an approval of it. In this case there is nothing to show that Congress had any knowledge of the manner in which the council was organized. The organic act requires the secretary of the Territory to transmit to the President one copy of the laws and journals and to the president of the senate and speaker of the house two copies of the laws, for the use of Congress. Sections 1844, 1850, Rev. St. U. S. Congress, having before it the laws under consideration, may have been satisfied with their policy and may have deemed them proper and beneficial to the inhabitants of the Territory, being ignorant of the constitution of the bodies by which they were passed, whereas if it had been informed of the methods resorted to in organizing the council it

might and probably would have disapproved them on the ground that the action of the organizers of that body was revolutionary and calculated to provoke discord and dissatisfaction among the people. That the mere non-action by Congress is not to be taken as an approval of the acts of the Legislature, so as to preclude judicial investigation, has been expressly held by the Supreme Court of the United States in a very recent case. In Stoutenburgh *v.* Hennick, 9 Sup. C't Rep., 256, it appeared that certain acts of the Legislative Assembly of the District of Columbia had been submitted to Congress and portions of them repealed and disapproved. In the acts of Congress disapproving such portions nothing was said about the portions not disapproved. It was contended on the argument that, as Congress had expressly disapproved a part of those acts, it thereby impliedly approved the remainder of them. In passing upon this point, Mr. Chief Justice Fuller says: "Although by several acts Congress repealed or modified parts of this particular by-law, these parts were separably operative, and such as were within the scope of municipal action, so that this congressional legislation cannot be resorted to as ratifying the objectionable clause, irrespective of the inability to ratify that which could not originally have been authorized." Here is a case of the entire law being before Congress. It repeals a part which it was competent for the Legislative Assembly to enact and leaves unrepealed a part which the Legislature could not lawfully enact and which Congress could not empower it to enact; yet the court says, independent of the power of Congress to ratify the portions of the act not noticed in the repealing law, its mere non-action cannot be held or presumed to be a ratification. This case is conclusive of this point. It is but just to the learned justice who wrote the opinion of the court and to the other justices who concurred in the case of Chavez *v.* Luna, to say that the case of Stoutenburgh *v.* Hennick, *supra*, was not before this court when the judgment was rendered, and that none of us was aware of the ruling in it. Upon the whole case, I am of the opinion that the case of Chavez *v.* Luna should now be overruled, and that the judgment of the court below in this case should be reversed.

43 TERRITORY OF NEW MEXICO, } *ss:*
County of Santa Fé, }

I, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing ten pages of printed matter contain a full, true, and perfect copy of the opinion of the court and the dissenting opinion of Brinker, J., in the cause lately pending in said court, in which Lyons and Campbell *et al.* were complainants and appellants and James B. Woods, sheriff of Grant county, &c., *et al.*, were defendants and appellees, as the same are on file in my office.

Witness my hand and the seal of said court this 21st day of February, 1890.

S. BURKHART,
Clerk of Supreme Court of New Mexico.

44 THE UNITED STATES OF AMERICA:

To James B. Woods, sheriff of Grant county, New Mexico, and *ex officio* collector of taxes of said county; Richard Hudson, assessor, and Angus Campbell, John Classen, and Granville N. Wood, board of county commissioners of Grant county, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1890, next, pursuant to an appeal taken from the decree of the supreme court of the Territory of New Mexico, in the cause lately pending therein, in which Lyons & Campbell and others were appellants and you were appellees, by the said appellants to said Supreme Court of the United States, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico, this 31st day of January, 1890.

ELISHA V. LONG,
Chief Justice of the Supreme Court of the Territory of New Mexico.

I, Edward L. Bartlett, solicitor general of the Territory of New Mexico, attorney for said appellees, acknowledge the service of the within citation upon this 31st day of January, 1890.

EDWARD L. BARTLETT,
Solicitor General of New Mexico.

[Endorsed:] 279. Supreme court N. M. Jan'y term, '90. Lyons & Campbell *vs.* Wood *et al.* Citation. Filed in my office 31st day of Jan'y, 1890. S. Burkhart, clerk.

45 Know all men by these presents that we, William B. Childers, of Albuquerque, in the county of Bernalillo and Territory of New Mexico, and N. B. Laughlin, of Santa Fé, in the county of Santa Fé and Territory of New Mexico, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred and fifty dollars, current money of the United States, to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirty-first day of January, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at Santa Fé, New Mexico, in a suit depending in the supreme court of the Territory of New Mexico, between Lyons and Campbell *et al.*, appellants, and James B. Woods, sheriff of Grant county, *et al.*, appellees, and the said appellants having obtained an appeal to remove the said cause to the Supreme Court of

the United States, decree having been rendered against said appellants by said supreme court of the Territory of New Mexico, and the said appellants having filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said James H. McKenney, clerk as aforesaid, and charged to the said appellants in the prosecution of the said appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

46 WILLIAM B. CHILDERS. [SEAL.]
NAPOLEON B. LAUGHLIN. [SEAL.]

Sealed and delivered in presence of—
S. BURKHART.

I, chief justice of the supreme court of the Territory of New Mexico, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

ELISHA V. LONG.
Chief Justice of the Supreme Court of the Territory of New Mexico.

[Endorsed:] 279. Sup. c't N. M. Jan'y term, 1890. Lyons and Campbell *vs.* Woods *et al.* Bond on appeal to Sup. C't U. S. for costs. Filed in my office 31st day of Jan'y, 1890. S. Burkhart, clerk.

Endorsed on cover: New Mexico Territory supreme court. No. 1427. Thomas Lyons and Angus Campbell, partners doing business as Lyons & Campbell, *et al.*, appellants, *vs.* James B. Woods, sheriff of Grant county, New Mexico, & *ex officio* collector of taxes of said county; Richard Hudson, assessor, and Angus Campbell, John Classen, & Granville N. Wood, board of county commissioners of Grant county. Filed October 17, 1890.

Office Supreme Court, U. S.
+FILED+
MAR 8 - 1894
JAMES H. McKENNEY,
CLERK.

153-649

No. ~~1100~~. 267

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

THOMAS LYONS AND ANGUS CAMPBELL, PARTNERS, DOING BUSINESS AS LYONS AND CAMPBELL, ET AL., APPELLANTS,

vs.

JAMES B. WOOD, SHERIFF OF GRANT COUNTY, NEW MEXICO, AND EX-OFFICIO COLLECTOR OF TAXES OF SAID COUNTY; RICHARD HUDSON, ASSESSOR, AND ANGUS CAMPBELL, JOHN CLASSEN, AND GRANVILLE N. WOOD, BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF OF APPELLANTS.

W. B. CHILDERS,
Solicitor for Appellants.

Geo. F. Albright, Printer, Albuquerque, N. M.

No. 1427.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

THOMAS LYONS AND ANGUS CAMPBELL, PARTNERS, DOING BUSINESS AS LYONS AND CAMPBELL, ET AL., APPELLANTS,

vs.

JAMES B. WOOD, SHERIFF OF GRANT COUNTY, NEW MEXICO, AND EX-OFFICIO COLLECTOR OF TAXES OF SAID COUNTY; RICHARD HUDSON, ASSESSOR, AND ANGUS CAMPBELL, JOHN CLASSEN, AND GRANVILLE N. WOOD, BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF OF APPELLANTS.

W. B. CHILDERS,
Solicitor for Appellants.

LYONS, CAMPBELL, ET AL.,
vs.
JAMES B. WOODS, ET AL.

The bill in this cause was filed for the purpose of enjoining the levy and collection of certain taxes to pay for the erection of a capitol and penitentiary at Santa Fe, New Mexico.

The taxes were assessed and levied under the provisions of an act passed by the Territorial Legislative Assembly on the third Monday of February, A. D. 1884.

A demurrer was filed to the bill and the demurrer sustained.

Complainants appealed to the Supreme Court of the Territory and the decision of the District Court was sustained by the Supreme Court, Judge Brinker dissenting.

Upon the face of the bill it appears that less than seven persons, constituted themselves a quorum of the Council of the Legislative Assembly, and passed upon the qualifications of two other persons to hold seats in that body, who were not returned elected and held no certificates of election. On the contrary the persons so seated were contesting the seats of two persons, who were returned elected, and who under the Act of Congress of February 14th, 1884, were entitled to seats in the Council, at least until the contests against them had been decided.

Having thus illegally seated these two persons, the acts were passed, under which the taxation, sought to

be enjoined was levied. At this time, less than a quorum was present unless, the two persons, so illegally seated as aforesaid, are counted as legal members.

After the passage of these acts, the committee on contested elections reported on the said contest cases, and the report was adopted, less than a quorum still being present, unless the members illegally seated as aforesaid, on the day of the organization are counted to make a quorum to vote on their own cases.

Appellants contend that these two persons, respondents in the contest cases, and without any *prima facie* right to seats could not go to make up a quorum, and that the acts of less than a quorum were void, that seven members who had a *prima facie* right to seats were necessary to constitute a quorum—or seven members all of whom had such *prima facie* right, or whose rights as contestants had been passed upon by a legal quorum were necessary to valid legislation, and that as the acts in question were not passed by such a quorum, they are void.

The Court will look at the Journals of Legislative bodies to see if legislation has been constitutionally and legally enacted:

Town of South Ottawa vs. Perkins, 94 U. S., 267.

Gardiner vs. Collector, 6 Wallace, 511.

Brown vs. Nash, 1 Wyoming, 90.

Post vs. Supervisors, 105 U. S., 668.

Gregg vs. Forsythe, 24 How., 179.

The Railroad Tax Case, 8 Sawyer, 293.

Green vs. Weller, 32 Mississippi, 651.
Spangler vs. Jacoby, 14 Ill., 160.
People ex. rel. Barnes, vs. Stearne, 35 Ill., 121.
Ryan vs. Lynch, 68 Ill., 160.
Pacific Railroad vs. Governor, 23 Mo., 353.
Burnham vs. Morissey, 14 Gray, 238.
Miller vs. State, 3 Ohio, N. S. 475.
Southwark Bank vs. Commonwealth, 2 Pa., St. 446.
Prince vs. Skillin, 36 Am. Rep., 641, and note 21 Am. Rep., 738.
Debord vs. People, 1 Denio 9.

As to what constitutes a quorum, and what is meant by "House" in the organic act, see:

Southworth vs. Jackson R. R. Co., 2 Mich., 287.
The Executive Session, 12 Florida, 659.
Cooley's Const. Lim., 141-125.

There can be no such thing as *de facto* legislation The rule that the acts of *de facto* officers are upheld applies to purely ministerial officers.

Constitutional restrictions upon legislative bodies would be entirely nugatory if any rule can be applied to sustain acts of a body of usurpers claiming to be a legislature.

The act of Congress (23 Statutes at Large, 3) prescribing who were to have seats in the Legislative Assembly has the same force and effect as a constitutional provision.

The dissenting opinion of Judge Brinker, which is a part of the record, (see transcript of record, pages 19 to 35) is a full and complete statement of the law applicable to the position taken by complainants, and complainants hereby adopt the same and make it a part of their brief.

Authorities of the different states upon the question as to whether the Journal can be appealed to to show an Act of the Legislative to be invalid, are fully collected in a note to case of Field vs. Clark, 143 U. S., 648. The question here is, could two persons, until the Legislature Council had regularly passed upon their qualification as members of that body, and who were not returned elected, be seated as members and participate in legislation and thereby make a quorum in violation of the Act of Congress of February 14th, 1884, especially authorizing this session of the Legislature. This act expressly provided that "persons returned elected should hold seats in said Legislative Assembly subject to valid contests."

All of which is respectfully submitted.

W. B. CHILDERS,

Solicitor for Complainants.